128 I.A.2 38

NO. 53833 ABST.

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
vs.	)	
RICHARD BRADLEY, Appellant.	)	HONORABLE PHILIP ROMITI, PRESIDING.

MR. JUSTICE LEIGHTON DELIVERED THE OPINION OF THE COURT:

The Public Defender moves to withdraw as appellant's counsel. In support of this motion a brief has been filed in compliance with the ruling of the United States Supreme Court in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). The Public Defender represents that appellant's only issue for an appeal would be whether the trial judge fully informed him of the significance and consequence of his pleas of guilty. From his review of the record, the Public Defender has concluded that the admonitions and advice the trial judge gave appellant before accepting his guilty pleas complied with the statute, the rule of the Supreme Court and case law on the subject. Ill. Rev. Stat. 1967, ch. 38, sec. 115-2; Supreme Court Rule 401 (d), Ill. Rev. Stat. 1967, ch. 110A, sec. 401(b); People v. Ballheimer, 37 Ill. 2d 24, 224 N.E. 2d 811; People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E. 2d 312. The Public Defender concludes that an appeal in this case would be frivolous.

On October 23, 1968 appellant, Richard Bradley was indicted for three robberies. Two were armed robberies, the other unarmed. November 1, 1968 he was arraigned and pled not guilty. The Public Defender was appointed to represent him. On December 17, 1968, appearing with counsel, appellant informed the court he wanted to withdraw his pleas of not guilty and plead guilty. Prior to accepting the pleas the trial judge

explained the consequences of a guilty plea. He told appellant that for each offense the sentence could be a term of years in the penitentiary "[i]t may be any number of years not less than two years, and it could be two to life. Do you understand that?" Appellant answered, "Yes, Sir." Judgment was entered on each plea. Appellant was sentenced to serve not less than four nor more than six years, the sentences to run concurrently. After sentences were imposed, the trial judge advised appellant of his right of appeal. The Public Defender docketed his appeals in this court.

On September 26, 1969 a copy of the Public Defender's petition for leave to withdraw and the brief were mailed to appellant. On April 30, 1970 he was notified by this court that the petition and brief were under advisement and he was given until July 1, 1970 to file any point he may choose in support of his appeal. Appellant has not responded to these communications.

In the discharge of our duties we have examined the record. We agree that an appeal in this case would be wholly frivolous and without merit. The petition of the Public Defender to withdraw as counsel for appellant is allowed and the convictions are affirmed.

AFFIRMED.

DRUCKER, J. and ENGLISH, J., Concur.

Abstract

NO. 54306

128 I.A.2 49

ABST.

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
vs.	)	
RICHARD FORD, Appellant.	)	HONORABLE JAMES J. GEROULIS, PRESIDING.

MR. JUSTICE LEIGHTON DELIVERED THE OPINION OF THE COURT:

The Public Defender petitions for leave to withdraw as attorney of record for appellant. He has filed a brief giving the reasons for his request pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). He states, after examining the record on appeal, that the only issue that could be presented for review is whether defendant was denied procedural due process of law in his probation violation hearing.

In the discharge of our duties, we have examined the record. We find that on August 24, 1966, defendant was charged with two robberies. The indictments were consolidated. He was arraigned. The Public Defender was appointed to represent him. Pleas of not guilty were entered. On December 5, 1966 defendant withdrew these and entered pleas of guilty to both indictments. After a hearing, defendant was admitted to probation for a period of five years, the first six months to be served in the County Jail.

Thereafter, three applications for warrants were made by the Chief Probation Officer seeking termination of defendant's probation. The first, dated September 27, 1967, reported to the court that defendant had been charged with battery, resisting arrest and disorderly conduct. Defendant was found not guilty of these charges and the application was dismissed. The second, dated June 18, 1968, told the court that defendant

was being held on a charge of murder. He was acquitted of this charge and the application was also dismissed. The third, dated October 10, 1968, reported to the court that, in violation of his probation order, defendant had failed to report to the probation office.

On Nobember 6, 1968 the trial judge conducted a hearing of the rule issued on defendant to show cause why his probation should not be terminated. After hearing evidence, the trial judge found that defendant had indeed failed to report. Nonetheless, he allowed defendant liberty on his own recognizance in the sum of $1,000.00 and continued the cause to December 24, 1968 for a disposition which included the possibility of allowing defendant to stay on probation.

On December 24, 1968, the cause was further continued to January 6, 1969. On that date, defendant was represented by counsel. The court was informed that in the period since November 6, 1968 defendant was charged with and convicted of theft in the Municipal Division of the Circuit Court of Cook County in Cause No. 68 MC 984104. During the hearing, defendant by his counsel admitted he had been tried, found guilty and sentenced to serve one year in the Illinois State Farm in Vandalia. The trial judge then revoked defendant's probation and sentenced him to serve not less than three years nor more than six for the two robberies, the sentences to be served concurrently.

A review of the proceedings discloses that the guidelines of Ill. Rev. Stat. 1967, ch. 38, sec. 117-3 were followed in the hearing that resulted in revocation of defendant's probation order. See People v. Price, 24 Ill. App. 2d 364, 164 N.E. 2d 528; People v. Dwyer, 57 Ill. App. 2d 343, 206 N.E. 2d 113.

On May 4, 1970 defendant was notified by this court that the Public Defender had moved to withdraw as his attorney.

He was sent copies of the petition and the brief in support. He was advised that he had until July 6, 1970 to file any points he thought could support his appeal. Defendant has not responded.

We have considered the Public Defender's brief in support of the petition to withdraw. Our examination of the record on appeal leads us to conclude that the appeal is frivolous and without merit. The petition of the Public Defender for leave to withdraw is granted and the judgment is affirmed.

JUDGMENT AFFIRMED.

DRUCKER, J. and ENGLISH, J., Concur.

Abstract

ABST. 128 I.A.2 63

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable CHARLES H. DAVIS, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On August 6, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

[illegible] the court ordered a preliminary

No. 70-37

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

REPCO ENTERPRISES, INC., Plaintiff-Appellee,	)	
v.	)	Appeal from the Circuit Court of McHenry County, Illinois.
UNITED AUTO WORKERS LOCAL 184, JOSEPH A. SKWATT, Business Agent of United Auto Workers Local 184 and CAROLINE WILKINS, President of United Auto Workers Local 184, Defendants-Appellants.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The plaintiff, Repco Enterprises, Inc. of Richmond, Illinois, on January 16, 1970, filed a verified complaint for injunction in the Circuit Court of McHenry County against the United Auto Workers Local 184 and certain individuals who represent that union. No affidavits were attached to the complaint. Plaintiff's contract with the defendant union had expired at midnight on January 10, 1970; a new contract was being sought by the union members and a strike began on January 13, 1970. Approximately one-half hour after the complaint was filed an ex parte hearing was held without notice to defendants wherein a Deputy Sheriff of McHenry County and the vice president-general manager of the plaintiff corporation testified to certain activities engaged in by the pickets at the plaintiff's plant on January 14 and 15. After the hearing, and based upon the complaint and the testimony ex parte, the court ordered a preliminary

injunction to issue. Prior to the issuance of the preliminary injunction the plaintiff had on that day amended its complaint to include Caroline Wilkins, an employee of the plaintiff and president of the U.A. W. Local 184, as an additional party defendant and amended its prayer for relief to request relief more specific in nature. The injunction granted the relief sought by the plaintiff, and barred the defendants from interfering with the ingress and egress of persons or vehicles on the plaintiff's property by blocking or obstructing by mass picketing or by any other means whatsoever any of the entrances to plaintiff's property; from threatening to inflict bodily injury on plaintiff's employees and from intimidation, violence or threats of violence to prevent said employees from entering or leaving the plaintiff's property. The court also on that date entered an order that the Sheriff of McHenry County serve writs of injunction on the defendants.

On January 23, one of the defendants, Joseph K. Skwatt, business agent of the U.A. W. Local 184, appeared and moved to dissolve the preliminary injunction which had been issued without notice to the defendants. The motion to dissolve alleged that no notice of the motion for injunction was given to any of the defendants and no bond was required: that contrary to the requirements of Illinois Revised Statutes, 1969, chapter 69, paragraph 3, neither the verified complaint, nor any affidavit accompanying the same recited specific facts indicating that immediate and irreparable injury, loss or damage would result to the applicant before notice could be served and a hearing had thereon; and that the court should grant defendants their costs and damage for monetary loss caused defendants by the wrongful application, issuance and execution of the preliminary injunction contrary to the explicit provisions of the statute. The court, after hearing arguments, and no further testimony, denied the motion to

dissolve the injunction and entered an order confirming the original injunction, which, by the terms of the order, was to remain in effect "during the pendency of the strike." Defendant Skwatt has appealed.

The question presented on this appeal is whether the trial court erred in issuing a preliminary injunction without notice and without bond and in denying the motion to dissolve the injunction. The granting of a preliminary injunction is determined by statutory provisions which are as follows:

> "No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party unless it clearly appears, from specific facts shown by the verified complaint or by affidavit accompanying the same, that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. As amended by act approved Aug. 7, 1967. L 1967, p. 2714." Ill. Rev. Stat. 1969, ch. 69, sec 3.

* * * * * * *

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise Added by act approved Aug. 7, 1967. L. 1967. p. 2714." Ill. Rev Stat. 1969, ch. 69, sec. 3-1.

The law on the subject of granting a temporary injunction without notice is summarized in the opinion of this court in Miollis v. Schneider, 77 Ill. App. 2d 420. In that case it was pointed out that an injunction is an equitable remedy and also an extraordinary remedy to be

used sparingly with judicial restraint and only in a clear and plain case; an injunction is granted before a hearing of the case on its merits to prevent a threatened wrong or furtherance of a current injury. Its purpose is not to decide the merits of the case. It is also clearly pointed out that the law does not favor granting injunctions without notice, as an injunction without notice is most drastic and should only issue under extreme circumstances; that notice to an adversary is elemental in our system of justice and the courts carefully observe the fundamental right of a party to be informed of the injunction sought against him so that he may be present to defend himself. We quote from p 429 of that opinion wherein it was said:

> "In order to justify the issuance of injunction without notice, the sufficiency of the complaint is the test of the validity of the injunction order. The complaint must allege facts from which the chancellor can infer the need of protecting the plaintiff from undue prejudice arising from notice to the adverse party. The extraordinary character of the injunctive remedy requires that it be awarded only where the complaint shows on its fact a clear right to relief. "

In Compton v. Paul K. Harding Realty Co., 87 Ill. App. 2d 219, it is stated on pp. 223 and 224 that "The application for a temporary injunction must specify the facts that requice the unusual relief sought," and "it is necessary that excuse of the bond for good cause be justified by facts evident in the record."

In Stenzel v. Yates, 342 Ill. App. 435, it is also said on p. 439:

> "The general rules of equity pleading apply in injunction suits, but the requirements of definiteness and certainty as to the essential facts 'applies with peculiar force and strictness where the relief sought is injunction.' "

and on pp. 440, 441:

> "The extraordinary character of the injunctive

> remedy requires that it be awarded only where the complaint shows on its face a clear right to the relief. The facts relief upon to establish such right must be alleged positively and with certainty and precision, not mere opinions and conclusions." * * *
>
> "If the complaint before us had met the requirements above set forth, we would still be obliged to reverse this particular case, because the injunction was issued without notice, although there were no averments that would dispense with the necessity of notice. The complaint is silent on the subject, except for the general statements, that plaintiffs 'will suffer irreparable injury and will be unduly prejudiced,' by giving notice."

In light of the above law we now turn to the pertinent allegations of the complaint for injunction:

> "5. That on or about January 15, 1970, the UNITED AUTO WORKERS LOCAL NO. 184, acting through its membership through the use of force and a threat of force restrained certain employees of the Plaintiff, REPCO ENTERPRISES, INC., a corporation, from entering onto the property of the Plaintiff, REPCO ENTERPRISES, INC. a corporation, in order to prevent those certain employees from continuing their employment during the period of the strike.
>
> "6. That if the Defendant, UNITED AUTO WORKERS LOCAL NO. 184 is not restrained from continuing this course of action, the Plaintiff, REPCO ENTERPRISES, INC. a corporation, will be irreparably harmed in that production shall cease and that REPCO ENTERPRISES, INC., a corporation, will be unable to meet its contract requirements with various purchasers."

It has previously been noted that the complaint had no accompanying affidavits attached thereto and that the court permitted the general manager of the plaintiff, Raymond Barthen, and Deputy Sheriff Gerhardt Vandervalk to testify in support of the complaint. Barthen's ex parte testimony was that of his own personal knowledge there were employees who desired to work and that there had been trouble at the beginning of the shifts with most of the trouble occurring on the 11 p. m. to 7 a. m. shift. He did not testify any specific facts, but

merely that there had been trouble at the time mentioned. The Deputy Sheriff testified ex parte that attempts were made to stop people from entering the plant, that pickets blocked the paths of automobiles, that a smoke bomb was thrown, and that several pickets had rocked the first vehicle attempting to enter the plant parking lot.

Prior to the 1967 amendment of Illinois Revised Statutes, chapter 69, paragraph 3, provided that no court shall issue an injunction without notice "unless it appears from the complaint or affidavit accompanying the same" that the rights of plaintiff would be unduly prejudiced. In 1967 the statute was changed to read that no court shall grant an injunction "unless it clearly appears from the specific facts shown by the verified complaint or by affidavit accompanying the same" that irreparable injury would result before notice can be served and a hearing held. The 1967 amendment definitely evidences a legislative attempt to put a greater burden upon the plaintiff to allege more specific facts than did the previous law. Although the case law of Illinois, even prior to the 1967 amendment, required that specific facts be alleged, it must clearly appear therefrom that irreparable harm would result. After looking at paragraphs 5 and 6 of the complaint, it immediately becomes apparent that they contain no facts from which the court could infer the need for protecting the plaintiff from undue prejudice or irreparable injury and compel the issuance of an injunction without notice to the adverse party. The allegations are merely conclusions and not allegations of specific fact, and cannot justify the failure to give notice or bond. The plaintiff has cited the case of General Elec. Co. v. Local 997, Etc., 8 Ill. App. 2d 154, in support of its position, but a reading of the complaint filed in that case reveals that very specific acts were alleged in the complaint and affidavit to warrant the granting of an injunction to enjoin mass picketing and other conduct in connection

with a strike.

The Judge in his order granting the preliminary injunction recited that he had considered the testimony of Barthen, and the Deputy Sheriff, but, no answer having been filed or issue of fact presented, the court could not properly consider that testimony and we must disregard it too. The motion for temporary injunction had to be determined solely upon the verified complaint. H. K. H. Devel. Corp. v. Metropolitan San. Dist., 47 Ill. App. 2d 46, 51. Furthermore, at best the verification of the pleading, even as amended by affiant Barthen on February 12, 1970, is insufficient to support an injunction order because the verification is on information and belief. Fox v. Fox Valley Trotting Club,. Inc., 349 Ill. App. 132, 137; Hope v. Hope, 350 Ill. App. 190, 194. There are no facts in the complaint to explain why the injunction should issue without notice, and the order itself is silent in this regard. The order does say that the injunction was to issue without bond, but we cannot find any prayer for relief in the amended complaint requesting that the injunction issue without bond.

The defendant herein were known to the plaintiff and there appears to be no reason why notice could not have been given to one or more the defendants by telephone. Skarpinski v. Veterans of Foreign Wars, 343 Ill. App. 271, 275. Also, we detect no such urgency that a telephone call could not have been made from the courtroom to defendants or counsel so as to produce results on that day.

We distinguish the circumstances here from those in Streamwood Home Builders, Inc. v. Brolin, 25 Ill. App. 2d 39, 46, because in the Streamwood case the defendants had no centrally located address or known attorney. We have previously stated that the court's order dated on the day the injunction was granted directing the service of writs of injunction

definitely states the names of the defendants and their addresses. Furthermore, the defendant, Caroline Wilkins, was an employee of the plaintiff. We conclude that the injunction was improvidently issued.

The plaintiff has argued by motion in this court that the appeal was moot because the strike was settled before the appeal was perfected. This court by order rejected that argument. Plaintiff also argues that the defendant has suffered no damages. Defendant, in his motion to dissolve the injunction, moved the trial court to grant costs and damages for monetary loss caused by the wrongful issuance and execution of the preliminary injunction. He thus preserved this right to have damages, if any, determined if the injunction was improperly issued.

The injunction orders entered by the trial court are reversed and any writs issued thereunder are dissolved; the order of the trial court denying the motion of defendant Skwatt to dissolve such orders is likewise reversed; and the cause is remanded to determine whether or not the appellant, Joseph A. Skwatt, business agent of U. A. W. 184, suffered damages, if any, by reason of the temporary injunction being improperly issued.

REVERSED AND REMANDED
WITH DIRECTIONS.

DAVIS, P. J. and SEIDENFELD, J., concur.

UNIVERSAL SAVINGS AND LOAN ASSOCIATION, a corporation,	APPEAL FROM
v.	CIRCUIT COURT OF
COSMOPOLITAN NATIONAL BANK OF CHICAGO, Trustee under Trust Agreement dated March 10, 1959, known as Trust No. 8524 CHICAGO TITLE AND TRUST COMPANY, Trustee under Trust Deed dated March 21st, 1959; PETER NAHAKES; PETER J. VIAHAKIS; and UNKNOWN OWNERS.	COOK COUNTY.
PETER J. VIAHAKIS, Petitioner-Appellant,	Honorable
v.	Nathan M. Cohen
UNIVERSAL SAVINGS AND LOAN ASSOCIATION, a corporation, Respondent-Appellee.	Judge Presiding

MR. PRESIDING JUSTICE CRAVEN DELIVERED THE OPINION OF THE COURT.

In July of 1968, petitioner filed a petition purporting to be under Section 72 of the Civil Practice Act (Ill.Rev.Stat. 1967, ch. 110, para. 72) to set aside a decree entered by the Superior Court of Cook County in a mortgage-foreclosure proceeding. The original complaint for foreclosure was filed in 1960 and the decree of foreclosure was entered in August of 1961 and finally confirmed in January of 1962. The circuit court allowed a motion of the respondent, Universal Savings and Loan Association, to dismiss the section 72 petition. This appeal from that action was initially filed in the Supreme Court and thereafter transferred to this court.

Although many issues are urged and allegations made, as we view this record, the sole issue here is the applicability of the two-year limitation provision found in section 72 of the Practice Act, the specific statutory language being:

> "(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years." (Ill.Rev.Stat.1967, ch. 110, para. 72(3).)

A review of the chronology of this seemingly interminable litigation is necessary. We take the chronology from the petitioner's verified petition. A complaint against the petitioner to foreclose a mortgage was filed in October of 1960. Thereafter petitioner filed an answer. The matter was referred to a Master and the Master proceeded to hearings ultimately resulting in a Master's report and recommendation, objections to the Master's report, and finally the entry of a decree for foreclosure. In February of 1963, petitioner redeemed the premises, the subject-matter of the foreclosure proceedings. In the same month of 1963, petitioner filed a petition for leave to appeal from the foreclosure proceedings and that petition was denied by the Appellate Court. Subsequent efforts to appeal that denial to the Supreme Court of Illinois failed. Petitioner's efforts to litigate the issues in the United States District Court were to no avail and substantial collateral litigation, apparently involving the same subject-matter, ultimately resulted in conclusions unsatisfactory to the petitioner.

In this proceeding, both in his motion and in his brief, the petitioner engages in serious attacks on the Master-in-Chancery and some of the many judges to whom this matter had been assigned from time to time.

Stripped of all collateral issues, however, the issue in this case simply is whether the petitioner may, in July of 1968, attack a decree entered in 1961 in a section 72 petition when that decree has been sought to be attacked directly and collaterally. In our opinion, the Circuit Court of Cook County properly held that such a proceeding does not lie.

The Historical and Practice Notes under section 72 (S.H.A. ch. 110, sec. 72) tell us that this section was designed to combine the variety of post-judgment remedies that were available and to provide relief from final decrees or judgments under the circumstances therein enumerated. Subsection (3), as quoted above,

provides a two-year period within which to commence petition proceedings under section 72. In the absence of the commencement of proceedings within this period, such proceedings cannot be commenced, with the exceptions therein noted and not here applicable. Auto Exch., Inc. v. Litberg, 34 Ill. App. 2d 329, 181 N.E.2d 359 (1st Dist. 1962) (abst.).

Although the petitioner here asserts that the foreclosure proceeding sought to be attacked is void, such assertion does not find support in this record. See Antczak v. Antczak, 61 Ill. App. 2d 404, 209 N.E.2d 838 (1st Dist. 1965), and cases there cited. The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

SMITH and TRAPP, J.J., concur.

No. 69-104

128 I.A.2 255

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST.

JOHN FRANKLIN HOCKETT,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Bond County, Illinois.
-vs-	)	
	)	
MARY ELIZABETH HOCKETT,	)	Honorable William L. Beatty,
	)	Judge Presiding.
Defendant-Appellee.	)	

PER CURIAM:

Plaintiff John Franklin Hockett filed his complaint for divorce in the Circuit Court of Bond County alleging acts of adultery and extreme and repeated mental cruelty. The defendant, Mary Elizabeth Hockett, filed an answer admitting the acts of adultery and a counterclaim alleging extreme and repeated mental and physical cruelty. Both parties prayed for custody of their three minor children, Patricia Ann, age 12, Barbara Faye, age 9, and John Michael, age 6. The trial court granted plaintiff a divorce from the defendant on the grounds of adultery and granted custody of the children to the defendant with certain rights of visitation to plaintiff. Plaintiff appeals from that portion of the decree granting custody of the children to defendant.

In Nye v. Nye, 411 Ill 408, our Supreme Court stated at page 414:

> "Under our divorce statute the court is clothed with a large discretion in determining to which parent a child will be given. It is usual in such cases, due to the tender years of the child and in consideration of its best interests, to entrust its care and custody to the mother, she being a fit and proper person to rear the child. (Miner v. Miner, 11 Ill. 43; Draper v. Draper, 68 Ill. 17.) The maternal affection is more active and better adapted to the care of the child. Especially is this true in the case of a minor daughter, where the care and guidance of a mother's hand is doubly important. This principle has become so well fixed and followed in this State that this court has not in recent years been called to rule upon it. Therefore, compelling evidence must be presented, proving the mother to be an unfit person, to cause the custody of her minor daughter to be denied her, or there must be a positive showing that to deny custody to the mother would be for the best interest of the child."

There is evidence in the record from several witnesses that the defendant had always been a good mother to the children; that she had always adequately cared for the needs of the children in the past and would be able to do so in the future;

that the defendant and the children were deeply devoted to each other and that the children became extremely upset when they were separated from their mother. There is also evidence that if the children were awarded to the plaintiff, he would have to hire outside help to take care of them. A local doctor testified that a couple of months before the trial he saw the plaintiff, accompanied by his two young daughters, at a hospital. They were separated from their mother and "were emotionally upset, in a near hysterical state at that time." He saw them alone in an examining room and then told the plaintiff that a sedative would do no good; but that the situation could be corrected by returning the children to their mother or at least reassuring them that they would see her. He gave the children a light sedative, but told the plaintiff that this was not the whole answer.

Based on the evidence in the record that the defendant's course of adulterous conduct had ceased at the time of the trial and was not likely to re-occur, and that she was otherwise a fit mother for her children, we believe that the trial court exercised its discretion reasonably in awarding the custody of the children to the defendant. See Nye v. Nye, supra. The trial judge saw and heard the witnesses and was in a better position to determine what alternative was best for the welfare of the children.

The decree of the Circuit Court of Bond County is affirmed.

Judgment Affirmed.

PUBLISH ABSTRACT ONLY.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11210 Agenda No. 70-22

People of the State of Illinois,
Plaintiff-Appellee

vs.

Joe Meny,
Defendant-Appellant

Appeal from
Circuit Court
Macon County

CRAVEN, P.J., delivered the opinion of the court.

The defendant was found guilty in a jury trial of a charge of theft of property with a value in excess of $150. He was sentenced to the Illinois State Penitentiary for a term of not less than three nor more than ten years. This appeal is from that conviction and sentence. The defendant urges that the evidence is not sufficient to establish his guilt beyond a reasonable doubt.

The testimony is conflicting. From the testimony it appears that one Merlin Born worked as an employee of a service station in Decatur, Illinois, known as Scotty's Gulf Station #2. At around 8:00 P.M. on February 26, 1968, Born reported to the Decatur police that he had been robbed by two Negro men and had

been hit upon the head in a back room of the station.

Born testified that he was working alone in the station when Joe Meny, the defendant, and one John Joynt came into the station. According to Born, at that time Meny suggested that they "fake" a robbery and Born gave Meny and Joynt a paper bag, containing over three hundred dollars, and a coin changer. Born then went to a back room and either Meny or Joynt hit him on the head. After the departure of the defendant and Joynt, Born called the police and reported the robbery, giving the misinformation to the police. At the time of the offense Meny and Joynt were using an automobile belonging to Meny. Apparently Joynt was driving. At the time of the trial Born had entered a plea of guilty to the offense and his request for probation was pending.

Clayton Scott, the owner of the service station, testified that over three hundred forty dollars was missing on the date of the offense and that Merlin Born was employed by him on that date. A detective of the Decatur Police first testified as to a conversation with the defendant on December 3, 1968, in the course of which he stated the defendant admitted the offense and ultimately made a written statement, which was admitted into evidence. In that statement the defendant recited that Born had come to him telling of his need for $150 in order to make a car payment and rent payment and suggested the "fake" robbery. Joynt was

reported to be interested in the deal. Thereafter the defendant's version of what took place is recited.

John Joynt, called as a court's witness, testified as to the events on the night of the offense, the substance of his testimony being that the defendant had nothing to do with the offense, that in fact the defendant "was drunk and passed out" in the back seat of the automobile at the time of the offense. He did admit that the defendant received some of the money from the robbery but denied that at the time of its receipt the defendant knew of the source. Joynt was impeached by evidence of a prior conviction and by a prior written inconsistent statement.

The defendant testified in his own behalf and stated that he had no independent knowledge of the events that happened in the two-hour period preceding 8:00 P.M. on February 26, 1968; that he had been intoxicated and was "passed out" in the back of his car. He did admit to receiving some of the money and to disposing of a coin changer. The defendant admitted that he signed the written statement previously referred to, but for the most part asserted that the matters set forth in the statement were not true, contending that he wrote that which the officer suggested that he write. Other witnesses were called relating to acts and events prior and subsequent to the offense that would tend to corroborate either the testimony of the defendant

or of Born. We deem it unnecessary to recite this testimony in detail, for there is no controversy between the parties but that the testimony in this case is in conflict, and the truth obviously lies within the controverted set of facts contained in this conflicting testimony. A reviewing court cannot substitute its judgment for that of the trier of fact on the matter of the credibility of witnesses and the weight to be given their testimony. This is a function of the trier of facts. A reviewing court will not set aside a jury's verdict of guilty unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to cause a reasonable doubt as to the guilt of the accused. People v. Sumner, 43 Ill. 2d 228, 252 N.E.2d 534 (1969), and cases there cited. The testimony of the prosecution witnesses in this case, if believed by the jury, as it apparently was, was sufficient to support a verdict of guilty. The judgment of the Circuit Court of Macon County is affirmed.

Affirmed.

SMITH and TRAPP, JJ., concur.

128 I.A.2 426

No. 54383

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
PAUL HORONZY, Defendant-Appellant.	)	HON. ROBERT J. COLLINS PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was charged with the offense of burglary. At his arraignment he stated that he was indigent and the Public Defender was appointed by the court to represent him. A plea of not guilty was entered and on May 6, 1969 the case came on for trial. The plea of not guilty was withdrawn and a plea of guilty was entered. That plea was accepted by the court and the defendant was sentenced to the Illinois State Penitentiary for a term of one to four years. On May 29, 1969 defendant filed his notice of appeal and the Public Defender was again appointed to represent him. A petition for leave to withdraw has been filed by the Public Defender in this court on the ground that an appeal would be without merit and could not possibly be successful. Pursuant to Anders v. California, 386 U.S. 738 (1967) the Public Defender has filed a brief contending that the only possible basis for an appeal would be whether defendant was fully admonished as to the significance and the consequences of entering a plea of guilty to the crime charged in the indictment. Defendant was notified of the Public Defender's motion and given an opportunity to raise whatever contentions he might wish in support of his appeal. He has not responded to that notice.

A plea of guilty may be accepted in open court when the court finds from the proceedings had at the time the plea

is entered that the defendant understands the nature of the charge against him and the consequences of his plea. Ill. Rev. Stat., ch. 38, §115-2 (1969); Supreme Court Rule 401(b), Ill. Rev. Stat., ch. 110A (1969). In the instant case defense counsel informed the court that defendant had been fully informed of the consequences of a guilty plea, understood the consequences and still wished to withdraw his plea of not guilty and plead guilty. The court asked defendant whether counsel's statement was true and received an affirmative response. Defendant was then informed by the court that by pleading guilty, he waived his right to a jury trial and that he could be sentenced to the penitentiary for any term within the limits of one year to life. The court asked him whether, knowing that, he still wished to persist in entering a plea of guilty. Defendant replied that he did. Under those circumstances the acceptance by the court of defendant's plea was entirely proper. People v. Kontopoulis, 26 Ill. 2d 388, 186 N.E.2d 312; People v. Outten, 22 Ill. 2d 146, 174 N.E. 2d 685.

Our examination of the record in this case discloses nothing which is arguable on the merits and we therefore conclude that an appeal would be wholly frivolous. Accordingly the Public Defender is granted leave to withdraw and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

No. 69-154

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NANCY L. LOCK (Nee Lutz), Plaintiff-Appellant, -vs- CARLTON W. LUTZ, Defendant-Appellee.	Appeal from the Circuit Court of Madison County, Illinois (Third Judicial Circuit). Honorable Joseph A. Barr, Judge Presiding.

PER CURIAM:

Plaintiff Nancy L. Lock obtained a default divorce from defendant Carlton W. Lutz on December 7, 1965 and was awarded cutody of their minor child, Timothy Lutz, then age seven. On June 3, 1969 defendant filed a petition to modify the custody provision of that decree which was granted and plaintiff appeals.

Defendant's petition alleged that within the past year plaintiff has been guilty of unbecoming conduct adversely affecting the welfare of their child, in that "she, in the company of said minor child, frequents and loiters in taverns until late hours of the night, including school nights; that she leaves said minor child unattended at home alone until late hours during the night; that she otherwise so flagrantly has failed to raise said minor child in proper environment that the best interest of the child would be best served by changing the custody to the defendant."

After a hearing on the merits, the trial court found that plaintiff had been guilty of repeated, continuing and unbecoming conduct adversely affecting the proper raising of the child in that "she, in the company of said minor child, has frequented and loitered in taverns until late hours of the night, including the minor's school nights; that she has on several occasions committed adultery; that she has otherwise shown herself to be unfit to raise the said minor child; that said child had an unstable home atmosphere while in plaintiff's custody," and that the best interests of the child would be served by transferring custody to defendant.

Plaintiff urges on appeal that it was error for the trial court to modify the decree where there was no evidence that the change in circumstances affected the

child's welfare to a degree sufficient to warrant such modification.

Defendant argues that there were substantial changes in conditions since the divorce decree, which adversely affected the welfare of the child as found by the trial court, and that this finding should not be disturbed unless it is contrary to the manifest weight of the evidence. The changed conditions which defendant asserts adversely affect the welfare of the child are that plaintiff admitted committing adultery on several occasions; that there was evidence that another man stayed in plaintiff's one bedroom apartment on numerous occasions when the child was present; that plaintiff has moved on several occasions in the past years as far as Houston, Texas, and Chicago, Illinois, so that there is no stable home atmosphere for the child; that as a result of this moving the child has attended three different schools in the past three years; that plaintiff does not attend church or take the child to church on Sunday; that the plaintiff has worked as a bartender, although at the time of the hearing she was working at a jewelry store and that plaintiff admitted being in a neighborhood tavern in Alton three or four times a week and had the child with her many times until late hours, including school nights.

There is some evidence to substantiate each of the allegations of changed conditions made by defendant. However, the record also shows that plaintiff works at a steady job even though she makes only $60.00 per week, that her apartment is well kept and clean and that, although she admitted committing adultery, there is no evidence that she was promiscuous, and there is no evidence that the child was aware of or was exposed to this conduct. The child denied seeing or ever saying that he saw a man in bed with his mother. In addition, there was evidence, and defendant admitted, that the boy was clean and well dressed. His teacher had told both plaintiff and defendant's wife that Timmy was a bright, well-mannered boy who was always well-dressed and clean, although she apparently told defendant's wife that he could do better with more guidance. At the time of the hearing he was about to enter the high (meaning above average) sixth grade and was receiving good grades.

Timmy Lutz was questioned by the judge in his chambers, out of the presence of his mother and father. He testified that he would be eleven years of age in November (1969); that he loves both of his parents, but will live wherever the court

days he should live. He usually plays with his friends in the back yard of their apartment house. On one occasion his father took him to a football game. His father had a couple of beers and was pretty drunk driving home. He said he has not been visiting his father since May because he was always intoxicated. He usually starts drinking after four o'clock. That is the only reason he does not want to visit his father. On one occasion he told his father on the telephone that he did not want to visit him until he quit following him and his mother. On one occasion when he and a friend went skating, he went to his father's house where he had passed out on the carpet. Janice Lutz drinks once in a while and so does his mother. He knows Clem Mason and John Lock who were the alleged paramours of the plaintiff, but denies that either stayed overnight at their apartment. John Lock is good to him. He goes with his mother to the Wedge Tavern once or twice a week. He has fun when he visits his father and on occasion will call his mother to ask to stay later. He would prefer to live with his mother. He says Janice Lutz is O.K. She is good to him and he gets along all right with her.

Defendant had described his drinking as light to moderate and there was evidence that this description is accurate. On the other hand, there was testimony by a neighbor and the pastor of defendant's church that he and his wife enjoyed the highest reputation in the community and had never been seen intoxicated. Defendant and his present wife have no children of their own and they are obviously better off financially than the plaintiff.

There is no dispute as to the legal principles to be applied in this type of case and they do not require extensive citation. The difficulty is in their application. The decree awarding custody of Timothy to plaintiff was final as to the conditions then existing and it should not have been altered unless there had been a substantial change of conditions thereafter which affected the child's welfare. Nye v. Nye, 411 Ill 408; Collings v. Collings, 120 Ill App 2d 125. The changed conditions must adversely affect the welfare of the child to justify a modification of the decree since it is the welfare of the child that is of paramount importance, not the disputes of the parents.

the fact of committed adultery does not necessarily require a change in custody where there is no evidence that such indiscretion was detrimental to the child's welfare, as where the child is unaware of the indiscretion. Nye v. Nye, supra; Collings v. Collings, supra. Although Timmy has moved on several occasions in the past three years and has attended several schools, there is no evidence that this has affected his performance in school. His teacher described him as bright and well-mannered. He has never been reprimanded or ever failed a course. Although plaintiff has not taken the child to church, the record shows that he was at defendant's home on most Sundays and attended church with him. Finally, as to the evidence that the child was in the Wedge Tavern on various occasions until late hours, while this conduct in raising a child may not be very prudent, it was not sufficiently reprehensible to deprive plaintiff of the custody of her son which was unconditionally awarded to her in the final divorce decree. There was evidence that this tavern was a neighborhood establishment where other children were taken, although not at such late hours. There was no evidence that he was taken to other taverns in Alton. It appeared that the boy's grandmother worked there two nights a week and that on some occasions when he had been seen there, he had just returned from fishing or he was there with plaintiff to meet Marie Wesley, the owner of the tavern, before they would go bowling or doing other things.

In Nye v. Nye, supra, our Supreme Court stated at page 414:

> "Under our divorce statute the court is clothed with a large discretion in determining to which parent a child will be given. It is usual in such cases, due to the tender years of the child and in consideration of its best interests, to entrust its care and custody to the mother, she being a fit and proper person to rear the child. (Miner v. Miner, 11 Ill. 43; Draper v. Draper 68 Ill. 17.) The maternal affection is more active and better adapted to the care of the child. Especially is this true in the case of a minor daughter, where the care and guidance of a mother's hand is doubly important. This principle has become so well fixed and followed in this State that this court has not in recent years been called to rule upon it. Therefore, compelling evidence must be presented, proving the mother to be an unfit person, to cause the custody of her minor daughter to be denied her, or there must be a positive showing that to deny custody to the mother would be for the best interests of the child."

In the present case there is no evidence that plaintiff neglected or abused the child in such a manner as to justify the trial court's finding that she was an unfit mother. After a careful study of the record, we believe that it does not show such

changed conditions [illegible] would warrant a modification of the custody provisions of [illegible] and therefore the modification [illegible] decree as to the custody of [illegible] is a matter of discretion. See Laughlin v. Laughlin, 97 Ill App 2d 480; Arden v. Arden, 25 Ill App 2d 161, Maupin v. Maupin, 330 Ill App 401.

Judgment reversed.

PUBLISH ABSTRACT ONLY.